IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1423 OF 2004

Kamlakar Janardhan Naik
(since deceased, through his heirs)
Sanchita Kamlakar Naik 7 ors. ... Appellants
(Ori.Def.No.1)

V/s

Virbhadra @ Ashok Balaram Raut & ors. ... Respondents

Ms. Alpha Jhaveri holding for Mrs. Teja Katdare for the appellant.

Mr. D.A. Patil for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 26TH JULY, 2005

P.C.:

1. This is an appeal preferred by the appellants against the judgment and order passed by the Addl. District Judge, Raigad-Alibag dated 18.6.2004 allowing the appeal and dismissing the suit for partition and separate possession filed by the plaintiff and setting aside the order of the Civil Judge, Jr. Divn., Alibag, dated 29.6.1996.

2. I have heard the learned counsel for both parties.

Perused the record.

3. The plaintiff filed the suit for declaration of partition and separate possession of the respective share which was contested by the defendants on various grounds inter-alia submitting that the plaintiff was not entitled for the partition and the suit was barred by limitation.

4. The learned Trial Judge, after hearing both parties on available evidence came to the conclusion that the plaintiff has failed to prove that the suit property was the joint family property and plaintiff had share therein and, as such, the suit came to be dismissed.

5. The appeal was carried to the District Court, Raigad - Alibag. The learned Addl. District Judge, after hearing both parties and perusing the record, came to the conclusion that the appeal deserves to be allowed as the plaintiff has proved that the property was joint family property and plaintiff had share therein and, as such, the Trial Court’s order came to be set aside and appeal came to be allowed. Hence the present appeal.

6. At the outset, it may be noted that there is no

substantial question of law involved in this appeal. The learned counsel for the appellants sought to put reliance on the provision of Sec. 6 of the Hindu Succession Act in order to submit that the suit property was devolved by survivalship and not by succession as contemplated under the proviso to Sec. 6 of the Hindu Succession Act. However, in this regard, the factual matrix on record shows that Janardan was common ancestor and once that aspect is admitted, then the property owned by him at the time of his death in the year 1970 has to devolve as per Hindu Succession Act amongst the surviving heirs. Janardan died in the year 1970 i.e. after coming into force of the Act of 1956. It has to be noted that defendant No.1 deceased Kamalakar and after him his legal representatives are denying the share to the plaintiff and other defendants under the principle that the daughters i.e. mother of plaintiff (Vimal) and mother of Pratibha (Defendant No.2 Kamal) died in the year 1954. The position of the year of death of Vimal and Kamal, in my considered view, cannot change the legal position. It is not the case of the defendants that, prior to their death, their father had expired. On the contrary, it is the case that Vimal and Kamal died during the life time of Janardan. Therefore, in any manner, the property was held by Janardan. Thus,

the devolution of property shall be as per the succession under the Act of 1956 and the legal representatives, therefore, are bound to follow succession and get their respective shares. It is to be noted that death of Vimal and Kamal would not change the legal position because Janardan died in the year 1970 and, therefore, plaintiff and defendants 2 to 4 must get their respective shares from the property.

Once this position is clear, which is being considered even at this stage as a question of law, the facts as to entries in 7/12 extract and other revenue record would not change the legal situation and, therefore, I am of the view that the lower appellate Court has rightly held that the suit deserves to be decreed. I do not feel it necessary to interfere in such order and, therefore, the appeal deserves to be dismissed.

In the result, the appeal stands dismissed with no order as to costs. Consequently, Civil Application No. 1883 of 2004 also stands dismissed with no order as to costs.

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